2013 IL App (2d) 130037-U
No. 2-13-0037
Order filed December 27, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KWALJEET CHAWLA & ASSOCIATES, INC., by its Authorized Agent, Key Investment & Management, Inc.,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff and Counter Defendant-Appellee,	)	
v.	)	No. 11-LM-0475
IN THE BAG RECORDING STUDIO., INC. and ROBERT L. CAPLAN,	)	
Defendants and Counter Plaintiffs-Appellants.	)	Honorable Bonnie M. Wheaton, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* Because plaintiff permitted the Studio to extend the lease without strictly complying with the lease's terms, and without the guarantor's consent, the guaranty did not apply during any of the three extended lease terms. Further, the trial court's assessment of damages in plaintiff's favor was not against the manifest weight of the evidence. Finally, the lease provided for an award of attorney fees, and the trial court's award of such fees did not constitute an abuse of discretion. Thus, we affirmed in part, reversed in part, and remanded with directions.

¶ 2 In 2005, plaintiff, Kwaljeet Chawla & Associates, Inc., entered into a lease agreement with defendant, In the Bag Recording Studio, Inc. (the Studio). Defendant Robert Caplan guaranteed the lease. In 2011, plaintiff filed a forcible entry and detainer complaint pursuant to section 9-101 of the Forcible Entry and Detainer Act (the Act) (735 ILCS 5/9-101 (West 2010)). Defendants filed a counterclaim seeking injunctive relief for possession and a setoff for damages. The trial court entered an agreed order for a judgment in favor of plaintiff with respect to possession. Thereafter, following a bench trial, the trial court entered a judgment against defendants, jointly and severally, for $23,109.19, which included $7,800 for attorney fees and costs. On appeal, defendants contend that (1) the guaranty to the lease was ambiguous as to whether it applied to the extended lease terms, and the Studio was in default when it initially extended the lease; (2) the trial court's determination to award plaintiff damages for repairing the premises was against the manifest weight of the evidence; and (3) the trial court "unfairly curtailed" cross-examination during the hearing on plaintiff's petition for attorney fees and costs. For the reasons set forth below, we reverse in part and affirm in part.

¶ 3 I. Background

¶ 4 The record reflects that, on April 20, 2005, the parties entered into a lease for commercial space located at 850 N. Ridge Avenue in Lombard. The lease was scheduled to end on April 30, 2007. The Studio intended to use the premises as a music and voice recording studio. Michael Caplan was the Studio's president and signed the lease on its behalf. Defendant Robert Caplan, Michael's father, executed a lease guaranty, which was contained on the last page of the lease. The guaranty, in its entirety, provided:

> "On April 20, 2005, in consideration of Ten Dollars ($10.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned Guarantor hereby guarantees the payment of rent and performance by Lessee, Lessee's heirs, executors, administrators, successors or assigns of all covenants and agreements of the above lease."

Paragraph 36 of the rider, which was incorporated into the lease, provided the Studio with an option to renew the lease for an additional two-year term. The option would be available so long as the Studio was not in default and exercised the option to renew "at any time prior to the date which shall be three months from the expiration of the original lease term."

¶ 5 On March 19, 2007, plaintiff and the Studio entered into a lease extension agreement, extending the lease term until April 30, 2009. Plaintiff and the Studio entered into similar lease extensions on January 9, 2009, extending the lease term until April 30, 2010, and on February 18, 2010, extending the lease term until April 30, 2011. Each extension specified that it was "a rider to and forms part of the lease dated April 20, 2005 ***." Michael signed the extensions on the Studio's behalf. The extensions did not contain a new guaranty, and Robert's signature did not appear on the extension agreements.

¶ 6 On February 8, 2011, plaintiff filed a complaint against defendants for forcible entry and detainer. Plaintiff's complaint alleged that defendants had defaulted on their rent. Plaintiff sought possession of the premises and $12,549.03 in damages. On June 1, 2011, defendants filed their response and counterclaims. Defendants' first count of their counterclaim sought a declaratory order that defendants could remain in possession of the premises. Defendants' second count sought a

setoff for damages. Specifically, the counterclaim alleged that, on March 2, 2011, plaintiff had changed the keys to the premises in violation of the Act. Defendants alleged that they suffered $900 in damages resulting from lost business, and also sought in excess of $50,000 in damages from not being able to use their professional equipment and furnishings.

¶ 7 On June 22, 2011, the trial court entered an agreed case management order. The order entered judgment in plaintiff's favor regarding possession, effective September 30, 2011, and ordered defendants to pay plaintiff $2,970 for the use of the premises until that date. The order specified that all remaining claims survived, and ordered plaintiff to respond to defendants' counterclaims.

¶ 8 A bench trial commenced on December 13, 2011. Plaintiff first called Jeanine Valdez. Valdez was a property manager for Key Investment and Management, a company that managed property, including the premises leased to the Studio. Valdez testified that the Studio vacated the premises on September 30, 2011. Valdez testified regarding a proposal from a contractor to return the premises to a rentable condition totaling $2,900, of which $1,500 in repairs was attributable to the Studio. The damage to the premises included debris, a dirty bathroom, missing light fixtures, repairing an exit sign, and duct work.

¶ 9 On cross-examination, Valdez admitted that she did not know the condition of the premises when the Studio first occupied the space. Valdez also acknowledged that she did not have an itemization of the repairs made to the premises. Valdez testified that, when the original lease term ended on April 30, 2007, $2,320 in rent remained due. Plaintiff rested after Valdez's testimony.

¶ 10 Defendants first called Valdez as an adverse witness. Valdez acknowledged that she was the property manager for the premises on March 2, 2011. Valdez testified that, on February 21, 2011, she sent Michael a certified letter. The purpose of the letter was to advise Michael that the management company needed a set of keys to the premises. Valdez testified that the management company was required to have set of keys; she left voice mail messages for Michael that were not returned, but she did not email him. Valdez acknowledged that, at the time she changed the locks to the premises, she had no verification that Michael was aware that management needed a key to the premises. Valdez testified that her boss instructed her to change the locks to the premises. Valdez testified that she left a note on the premises door after changing the locks.

¶ 11 Jacob Alberico testified next on defendants' behalf. Alberico was the Studio's client and has recorded four albums with Michael. Alberico testified that, on March 2, 2011, Michael called him to advise that his appointment at the Studio had been canceled, and Michael told him the next day that he had been locked out. Alberico testified that he was going to pay Michael $500 for the canceled session. On cross-examination, Alberico admitted that his band was able to make up the canceled session and that he paid Michael for that time.

¶ 12 Michael testified next on defendants' behalf. Michael testified that, on March 2, 2011, a client arrived at his studio at around 2 p.m. The client called him, as he was not yet at the studio, and advised that there was a "big note" on the door advising that he had been locked out. Michael emailed Valdez, who responded that she sent him a certified letter saying that management did not have a key to the premises. Because Michael did not respond to that letter, she had to change the locks. Michael testified that he generally communicated with Valdez by email. Michael testified

that he never received a voice mail message from Valdez about the keys and that the only voice mails he generally received from her involved paying rent. Michael testified that he had two clients scheduled for March 2, 2011. The first client was scheduled to pay him $500 and the second $400. Michael testified that he later went to Key Investment's office and Valdez gave him a key. Michael testified that he could not charge for the lost time because, on the days those appointments were made up, he could have been working with other clients.

¶ 13 On cross-examination, Michael testified that he arrived at the studio at approximately 2:15 p.m. After seeing the note advising that the locks had been changed, he decided to go to his home in Clarendon Hills, which was about 30 minutes away, as opposed to going to Key Investment's office, which was about 10 minutes away. Michael testified that he "wanted to know what was going on before [going] over there." Michael acknowledged that he received two notices from the post office regarding certified mail, but he never called the post office to inquire. Michael testified that he initially lost a client as a result of the lock-out incident, and he had to "wean" that client to return.

¶ 14 Robert testified next on defendants' behalf. Robert testified that he is an attorney but he did not prepare the lease. Robert testified that the lease contained a guaranty at the bottom of page four and that he executed the guaranty. Defendants attempted to introduce testimony regarding Robert's conversations with Miller regarding the guaranty, but the trial court sustained plaintiff's objection that such testimony should be excluded under the "four-corner" rule. The trial court concluded that the lease was unambiguous. Robert testified that he believed that the guaranty would last for only two years, from 2005 through 2007. Robert testified that he told Miller that he would sign the

guaranty for two years, and Miller responded "that's fine." Robert testified that he was not asked to sign a guaranty for any of the three extensions.

¶ 15 On cross-examination, Robert acknowledged that the guaranty provided that he would guarantee rent and performance of the lease and that there was not a two-year limitation provided within the guaranty.

¶ 16 Following closing arguments, the trial court found that the lease was unambiguous and that the guaranty was extended by the terms of the lease to any extensions. The trial court further found that plaintiff proved its forcible entry and detainer case by a preponderance of the evidence, including damages. The trial court entered a judgment in favor of plaintiff and against the Studio and Robert for $13,299.19, and $1,500 in damages.

¶ 17 Regarding defendants' dispossession counterclaim, the trial court concluded that "under the facts and circumstances of this case, there is no dispossession and the arguments that this is somehow worthy of damages at all, let alone exemplary damages, are unavailing and contradicted by the evidence." The trial court continued:

> "Michael *** testified as to his actions other than going to get the key from [Key Investment] *** . If there was any inability to get a key, it's partly due to [Michael's] own lack of action or his actions in traveling half an hour away instead of going ten minutes away to pick up a key. I think it's a spurious argument and I am going to deny any setoff whatsoever."

¶ 18 On June 29, 2012, the trial court entertained arguments on plaintiff's motion for attorney fees and court costs. Plaintiff's attorney testified that the lease contained a provision allowing for the recovery of such fees and costs. Plaintiff's attorney testified that he billed plaintiffs $200 per hour.

During the hearing, the trial court afforded Robert's attorney and Robert an opportunity to cross-examine plaintiff's attorney, but limited Robert's cross-examination. On cross-examination, plaintiff's attorney testified that Key Investment had paid his firm $3,660. The trial court found that plaintiff's attorney fees were reasonable and included an award of $7,800 in its judgment. Thereafter, the trial court entered a judgment in favor of plaintiff and against defendants for $23,109.19. Defendants timely appealed after the trial court denied their posttrial motions.

¶ 19 II. Discussion

¶ 20 Before addressing the merits, we note that plaintiff did not file a response brief. However, the absence of an appellee brief does not prevent us from addressing the issues raised because the record is simple and we can review the claimed errors without the assistance of an appellee brief. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 21 A. Lease Guaranty

¶ 22 The first issue that we will address is whether the lease guaranty Robert executed applied to the extended lease terms. Robert raises several arguments to support his contention that the trial court erred in finding that the guaranty applied to the extended lease terms, including that (1) the guaranty must be construed in favor of the guarantor; (2) "the law limits the duration of the guaranty *** to the duration of the obligation of the tenant"; (3) the guaranty did not contain language making the guarantor liable for the extensions; (4) the Studio did not have the option to extend the original lease term; (5) plaintiff's conduct demonstrated that the guaranty expired on April 30, 2007; and (6) the Studio's extension increased his risk. Because the Studio did not satisfy the conditions contained in paragraph 36 of the rider, which provided for an option to renew so long as the Studio was not in

default and exercised its option at least three months prior to the lease's expiration, we agree with Robert that the guaranty did not extend beyond the original lease term.

¶ 23 A guarantor's liability is determined from the guaranty contract, which is interpreted under principles of contract interpretation. *Bank of America National Trust & Savings Ass'n v. Schulson*, 305 Ill. App. 3d 941, 945 (1999). As our supreme court has noted, the basic rules of contract interpretation are well settled. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). Our primary objective is to give effect to the parties' intent. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). The best indication of the parties' intent is the contract's language, giving the words used their plain and ordinary meaning. *Id.* at 233. A contract must be construed as a whole, viewing each contractual provision in light of the other provisions; therefore, the parties' intent cannot be determined by viewing a specific provision in isolation or by looking at detached portions of the contract. *Thompson*, 241 Ill. 2d at 441. While guaranty contracts are to be strictly construed in the guarantor's favor, and a guarantor cannot be held liable for the lessee's obligations incurred during an extended term that was not secured in accordance with the lease's terms, the guarantor is entitled to that benefit only when some doubt exists in the meaning of the guaranty's language. *Roth v. Dollavou*, 359 Ill. App. 3d 1023, 1028 (2005). Thus, "[w]here the terms of a guaranty are clear and unambiguous, they must be given effect as written." *Id.*

¶ 24 In *T.C.T. Building Partnership v. Tandy Corp.*, 323 Ill. App. 3d 114 (2001), a corporation, which was later purchased by the plaintiff, leased commercial space to a lessee for a 20-year term. *Id.* at 115. The lease provided that the lessee, who was not a party to the appeal, had the option to extend the lease term for four additional terms of five years each, provided that it gave the plaintiff

written notice of its intent to do so at least six months prior to the expiration of the original term. *Id.* A guarantor, who was the defendant, executed a guaranty of the lease, which provided that the defendant agreed to "absolutely and unconditionally" guarantee payment of rent. *Id.* Thereafter, the lessee gave the plaintiff written notice of its intent to renew the lease for an additional five-year term, and notice was given within six months prior to expiration of the lease, as required by the lease. *Id.* at 116. During the extended term, the lessee filed for bankruptcy protection and the plaintiff sued the defendant for outstanding rent, among other damages. *Id.* Following a bench trial, the trial court concluded the lessee's notice to extend the lease term was untimely and that the guarantor never waived strict adherence to the notice provision to extend the lease term. *Id.* at 117.

¶ 25 On appeal, the reviewing court first considered the effect of the lessee's failure to strictly comply with the notice provision and the plaintiff waiving strict compliance with that provision had on the guarantor's liability under the guaranty. The reviewing court adopted the defendant's argument that when a lessor, without the consent of the guarantor, permits a lessee to exercise its option to extend a lease's term without strictly complying with the notice provisions contained in the lease, the guarantor is released from liability during the extended term. *Id.* at 118. The reviewing court concluded that "adoption of such a rule best reflects our prior holdings that guaranty contracts are to be strictly construed in favor of the guarantor" and that "liability of the guarantor should not be extended beyond the precise terms of its undertakings." *Id.*

¶ 26 Nonetheless, the reviewing court concluded that the defendant did give its consent to be liable during the extended term even though the extended term was not secured in accordance with the lease's terms. *Id.* In reaching its determination, the reviewing court noted that the guaranty

contained language that the defendant's liability would not be discharged due to "waiver by [the plaintiff] of any of the provisions, covenants, agreements, conditions, or stipulations of the lease." *Id.* at 119. The reviewing court concluded:

> "The defendant agreed that [the plaintiff's] waiver of any of the conditions of the lease would not operate to release or discharge it from liability under the guaranty. The notice provision was a condition of the lease." *Id.* at 120.

¶ 27 In the present case, the record reflects that plaintiff permitted the Studio to extend the lease term without strictly complying with the provisions in the lease. In its complaint, plaintiff alleged that the original lease term was extended pursuant to an agreement dated March 19, 2007, which would have been within three months of the lease's expiration on April 30, 2007. The record is devoid of any indication that the Studio gave plaintiff notice of its intent to renew the lease at least three months prior to the lease expiring. The record is also devoid of any indication that Robert consented to extending the lease term without strict compliance to the lease's notice requirements. Thus, like *Tandy Corp.*, plaintiff granted the Studio permission to extend the lease term without strictly complying with the lease's notice provisions. *Id.* at 118. However, unlike *Tandy Corp.*, there is no indication that Robert gave his consent, either in the guaranty or elsewhere in the record, to the lease extension without strict compliance with the lease's notice requirements.

¶ 28 Accordingly, pursuant to the rule adopted in *Tandy Corp.* that, when a lessee exercises its option to extend a lease's term without strictly complying with the lease's notice provisions, and the guarantor does not consent, the guarantor is released from liability during the extended term (*id.* at 118), we reverse the trial court's determination that the guaranty applied to the extended terms. As

a result, Robert was liable as a guarantor for unpaid rent only during the original lease term. Therefore, we reverse and remand for the trial court to determine from the damages award what, if any, outstanding rent incorporated in the judgment can be attributed to the original lease term.

¶ 29 B. Damages

¶ 30 We next consider whether the trial court erred in assessing damages. The Studio contends that the trial court erred in denying both compensatory and punitive damages for Michael being temporarily locked out on March 2, 2011.

¶ 31 The issue of damages is a question of fact, and therefore, a trial court's finding of damages will not be disturbed on appeal unless it was against the manifest weight of the evidence. *Doornbos Heating & Air Conditioning v. Schlenker*, *Inc.*, 403 Ill. App. 3d 468, 485 (2010). A damage award is against the manifest weight of the evidence where it is apparent that the trial court ignored the evidence or that its measure of damages was erroneous as a matter of law. *Id.* In addition, " 'Illinois has long recognized the applicability, in the question of damages, of the doctrine of avoidable consequences, which prevents a party from recovering damages for consequences that party could reasonably have avoided.' " *Gaylor v. Campion, Curran, Rausch, Gummerson & Dunlop, P.C.*, 2012 IL App (2d) 110718, ¶ 61 (quoting *Union Planters Bank, N.A. v. Thompson Coburn, LLP*, 402 Ill. App. 3d 317, 356 (2010)).

¶ 32 In this case, the trial court's determination to not offset plaintiff's damages because plaintiff locked Michael out of the premises was not against the manifest weight of the evidence. At trial, Michael admitted on cross-examination that he had received two notices from the post office that certified mail had been sent to him, but he did not call or go to the post office to inquire about the

certified mail. From this evidence, the trial court could have concluded that the Studio could have reasonably avoided any damages resulting from Michael being locked out after plaintiff changed the locks. See *Maere v. Churchill*, 116 Ill. App. 3d 939, 946 (1983) (applying the avoidable consequences doctrine to bar the plaintiffs from seeking damages which could have been avoided).

¶ 33 Similarly, we reject defendants' argument that the trial court erred in awarding the cleanup costs to plaintiff because plaintiff failed to prove damages to a fair degree of probability. While a party must prove damages to a fair degree of probability, absolute certainty is not required. *Doornbos Heating*, 403 Ill. App. 3d at 484. Instead, a plaintiff need only present evidence that shows a basis by which to compute damages with a fair degree of probability. *Id.* Here, Valdez testified regarding a proposal from a contractor to return the premises to a rentable condition and testified that the Studio was responsible for $1,500 of those repairs. Because "mathematical exactitude" is not required and trial courts are given wide latitude with respect to damages, the trial court's determination to award plaintiff $1,500 in damages for clean-up costs was not against the manifest weight of the evidence. See *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 33 (concluding that the trial court's award of damages was not unreasonable or against the manifest weight of the evidence despite the plaintiffs failure to provide conclusive proof).

¶ 34 C. Attorney Fees

¶ 35 Finally, the Studio contends that the trial court erred awarding plaintiff attorney fees. The Studio argues that, while the lease provided for an award of attorney fees when plaintiff enforces a lease agreement or covenant, the lease did not provide for fees when plaintiff defends a counterclaim; and the trial court included fees for defending defendants' counterclaim in its order.

The Studio also contends that the trial court erred in assessing fees because the trial court awarded duplicate fees.

¶ 36 Under the common law, the losing party in a lawsuit does not have to pay the winning party's attorney fees, but parties to a contract may agree otherwise. *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 951 (2004). When assessing a trial court's attorney-fee award, we conduct a bifurcated standard of review. First, "to the extent the trial court interpreted the terms of the lease and sublease, our review is *de novo*." *Peleton, Inc. v. McGivern's Inc.*, 375 Ill. App. 3d 222, 225 (2007). Second, to the extent that the trial court applied the contractual terms to the facts, we apply an abuse-of-discretion standard of review. *Id.* at 226. "In considering the reasonableness of fees, a trial court should consider the attorney's skill and standing, the nature of the controversy, the novelty and difficulty the questions at issue, the importance of the subject matter, the degree of responsibility in the management of the case, the time and labor required, the usual and customary charge in the community, and the benefits resulting to the client." *City of McHenry v. Suvada*, 2011 IL App (2d) 100534, ¶ 18.

¶ 37 In this case, defendants' argument that the contract did not provide for attorney fees for defending a counterclaim is unavailing. The contractual provision provides:

> "16. Payment of Costs: Lessee will pay and discharge all reasonable costs, attorney fees and expenses that shall be made and incurred by Lessor in enforcing the covenants and agreements of this lease."

While we must strictly construe this provision, "strict construction" is a relative expression, not a precise term. *Erlenbush*, 353 Ill. App. 3d at 949. Whether construing a statute or a contract, the principle of strict construction is not violated by permitting words to have their full meaning. *Id.*

(citing *Warner v. King*, 267 Ill. 82 (1915)). The full meaning of the word "enforce" is "[t]o give force or effect to; to compel obedience to." Black's Law Dictionary 569 (8th ed. 2004).

¶ 38 Here, plaintiff brought suit under the Act due to outstanding rent, and defendants filed a counterclaim for a setoff of damages under the Act due to the March 2, 2011, incident. Plaintiff was compelled to defend its interpretation of its ability to gain access to the premises under the lease's terms. Giving the contractual term "enforcing" its fullest meaning, we believe that plaintiff's defense regarding its ability to access the premises falls within the ambit of the lease's "Payment of Costs" provision.

¶ 39 Moreover, the trial court's award of attorney fees was not an abuse of discretion. In awarding fees, the trial court considered an affidavit from plaintiff's attorney as well as testimony that plaintiff's attorney's billing rate was $200 per hour. The trial court considered that amount to be reasonable, and its determination was reasonable under the circumstances of this case. See *Suvada*, 2011 IL App (2d) 100534, ¶ 20 (finding the trial court's fee award to be reasonable).

¶ 40 In reaching our determination, we reject the Studio's arguments that the affidavit from plaintiff's attorney regarding fees was inadmissible hearsay testimony and that the trial court erred when it "unduly curtailed cross[-]examination." Illinois law is well settled that a full evidentiary hearing is not necessary to determine reasonable attorney fees. *Aurora East School District v. Dover*, 363 Ill. App. 3d 1048, 1058 (2006). A nonevidentiary hearing is proper when the trial court can determine what a reasonable fee would be from the evidence presented, including a detailed breakdown of fees and expenses, and the opposing party had an opportunity to be heard. *Id.*

¶ 41 Here, the trial court considered the affidavit and testimony from plaintiff's attorney before awarding fees. The record also reflects that, while the trial court limited Robert's cross-examination

of plaintiff's attorney, Robert's attorney was allowed to cross-examine plaintiff's attorney regarding fees. Because Robert's attorney cross-examined plaintiff's attorney regarding fees, and the trial court also considered the documentary evidence before awarding fees, we reject the Studio's due process arguments regarding plaintiff's attorney fees award. See *id.*

¶ 42 III. Conclusion

¶ 43 For the foregoing reasons, we reverse the trial court's determination that the lease guaranty applied to the extended lease terms and remand to the trial court to determine what, if any, outstanding rent can be attributed to the original lease term. The trial court's judgment is affirmed in all other respects.

¶ 44 Accordingly, we affirm in part the judgment of the circuit court of Du Page County, reverse in part, and remand with instructions.

¶ 45 Affirmed in part, reversed in part, and remanded with instructions.